Supreme Court of the United States

OCTOBER TERM, 1952

No. 680

HARVEY ALUMINUM INC. and HARVEY MACHINE CO., INC.,
Petitioners,

vs.

AMERICAN CYANAMID COMPANY, BERBICE COMPANY LIMITED and REYNOLDS METALS COMPANY,
Respondents.

BRIEF FOR RESPONDENTS IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Opinions Below

The orders of the United States District Court for the Southern District of New York were entered without opinion (R. 5, 17). The opinion of the Court of Appeals (AUGUSTUS N. HAND, *J.*, *R.* 132-137; all concurring) has not yet been officially reported.

Jurisdiction

The judgment of the Court of Appeals for the Second Circuit was entered on March 16, 1952 (R. 137). The peti-

tion for a writ of certiorari was filed in this Court on March 28, 1953. The petitioners seek to invoke the jurisdiction of this Court under Title 28 of the United States Code, Section 1254(1).

Questions Presented

(1) Did the Court of Appeals for the Second Circuit properly hold that the notice of voluntary dismissal filed by the petitioners (plaintiffs below) without application to the District Court for an order, was ineffective to dismiss their action against the respondents American Cyanamid and Berbice Company Limited.

(a) When respondents, while not filing a paper labelled "answer," had filed detailed affidavits and given exhaustive testimony fully answering petitioners' claim on the merits;

(b) When the issues presented by petitioners' action had been litigated at length on petitioners' motion for a preliminary injunction, and findings of fact and conclusions of law had been made thereon;

(c) While an appeal in the action was still pending in the Court of Appeals?

(2) Did the Court of Appeals for the Second Circuit properly hold that the notice of voluntary dismissal filed by the petitioners (plaintiffs below) without application to the District Court for an order, was ineffective to dismiss their claim against the respondent Reynolds Metals Company in the action:

(a) When the notice of dismissal does not purport to dismiss the claim against Reynolds alone;

(b) When Rule 41(a)(1) under which the notice of dismissal was served relates to the dismissal of an entire action and not to dismissal of a single party in an action, which requires a Court order under Rule 21;

(c) When the notice of voluntary dismissal filed by the petitioners purporting to dismiss the action as against all the respondents (defendants below) was held ineffective as to respondents American Cyanamid Company and Berbice Company Limited, and when Reynolds was an indispensable party to the action brought by the petitioners;

(d) When Rule 21, which relates to the dismissal or dropping of a single party, provides a safeguard against a multiplicity of actions, with the danger of conflicting decisions by requiring an order of Court?

Rules of Civil Procedure Involved

The pertinent rules of the Federal Rules of Civil Procedure, 28 U. S. C. A., involved are:

(1) "*Rule 21. Misjoinder and Non-Joinder of Parties*

Misjoinder of parties is not ground for dismissal of an action. Parties may be dropped or added by order of the court on motion of any party or of its own initiative at any stage of the action and on such terms as are just. Any claim against a party may be severed and proceeded with separately."

(2) "*Rule 41. Dismissal of Actions*

(a) Voluntary Dismissal: Effect Thereof

(1) By Plaintiff; by stipulation. Subject to the provisions of Rule 23(e), of Rule 66, and of any statute of the United States, an action may be dismissed by the plaintiff without order of court (i) by filing a notice of dismissal at any time before service

by the adverse party of an answer or of a motion for summary judgment, whichever first occurs, or (ii) by filing a stipulation of dismissal signed by all parties who have appeared in the action. * * *"

(3) *"Rule 73. Appeal to a Court of Appeals*

(a) * * *.

A party may appeal from a judgment by filing with the district court a notice of appeal. Failure of the Appellant to take any of the further steps to secure the review of the judgment appealed from does not affect the validity of the appeal, but is ground only for such remedies as are specified in this rule or, when no remedy is specified, for such action as the appellate court deems appropriate, which may include dismissal of the appeal. If an appeal has not been docketed, the parties, with the approval of the district court, may dismiss the appeal by stipulation filed in that court, or that court may dismiss the appeal upon motion and notice by the appellant. As amended Dec. 27, 1946 and Dec. 29, 1948, effective Oct. 20, 1949."

Statement

This action was commenced by petitioner Harvey Aluminum Inc., a California corporation, in the United States District Court for the Southern District of New York against respondent American Cyanamid Company, a Maine corporation, on December 5, 1952, by service of a temporary restraining order obtained *ex parte,* a motion for a preliminary injunction with supporting affidavits, and a verified complaint (R. 39-58). The complaint prayed for specific performance of an alleged oral contract to sell Harvey Aluminum, Inc. the "physical assets" of Cyanamid's subsidiary Berbice Company Limited, consisting of equipment and facilities in British Guiana for mining bauxite ore, (R. 60-62).

On December 9, 1952, in answer to Harvey Aluminum, Inc.'s motion for a preliminary injunction, which sought to restrain Cyanamid from selling the physical assets of Berbice (R. 39-41), Cyanamid served six detailed affidavits, together with exhibits (R. 59-104), denying the agreement alleged and putting in issue all the material allegations of the complaint.

A hearing upon the motion for a temporary injunction was held before Hon. SIDNEY SUGARMAN, United States District Judge, which occupied five days of testimony and argument, December 9, 1952 to December 14, 1952 (R. 9, 18, 116), and concerned the basic issue whether a binding contract had been made. Testimony of officials of petitioners and of all the respondents herein was taken, and the transcript of the record of this hearing comprised over 420 pages (R. 9).

On December 12, 1952, during the hearing, Berbice was joined as a party defendant, on its consent, and on December 13, 1952, Harvey Machine Co., Inc., was joined as a party plaintiff and thereafter participated in the hearing.

On December 14, 1952, Judge SUGARMAN denied the motion for a preliminary injunction. dissolved the temporary restraining order, and on December 17, 1952, he made and signed detailed findings of fact and conclusions of law, finding, *inter alia,* that the parties never intended to enter into any agreement other than a written contract; that the only document offered by the petitioners as a memorandum of the alleged contract was insufficient; that no written contract was ever entered into; and that petitioners' prospects of success in the ultimate trial of this action were "remote, if not completely nil." (R. 21, 23). On December 17, 1952, the order denying the motion for a preliminary injunction was entered (R. 116).

Meanwhile, on December 14, 1952, upon the petitioners' application, an order was entered under which petitioners

were permitted to join Reynolds Metals Company as a party defendant and Harvey Machine Co., Inc. and Berbice Company Limited were formally joined as parties (R. 113). On December 15, 1952, an amended complaint was served containing, in addition to the claim for specific performance against Cyanamid and Berbice, a separate claim against Reynolds seeking to impose a trust upon Reynolds as to assets of Berbice which Reynolds had agreed to purchase (R. 105-112).

On December 17, 1952, immediately following the entry of the order denying their motion for a preliminary injunction, the petitioners filed a notice of appeal to the Court of Appeals for the Second Circuit (R. 123) and made application for a stay or temporary injunction pending appeal (R. 11). This was denied by Judge AUGUSTUS N. HAND (R. 11) and since that time, petitioners have taken no steps to pursue or dismiss their appeal (R. 133).

On December 22, 1952, Berbice's assets were transferred to Reynolds pursuant to their contract.

On January 13, 1953, the petitioners served notice that the depositions of seventeen officers and employees of respondents would be taken on January 21, 1953.

Prior to January 16, 1953, the respondents were informed by their respective representatives in British Guiana, that the petitoners were about to institute legal action in British Guiana involving the same issues being litigated in New York (R. 18-20, 27, 28). The uncontroverted record shows that such action in British Guiana would subject respondents to great, immediate and irreparable damage involving the operation of the properties, and also cause great expense and harassment as it would require many important officials of respondents to go thousands of miles to a place with which communications are extremely difficult, to litigate the same issues as can be disposed of in the present action. (R. 12, 13, 19, 20).

To prevent such damage from multiplicity of actions, the respondents sought and obtained an order to show cause, containing a temporary order restraining the petitioners from commencing any action, suit, or legal proceeding in any other jurisdiction involving the same subject matter, facts and parties, and seeking a permanent injunction against the petitioners (R. 15-17). This order to show cause was served upon the petitioners on January 16, 1953 (R. 15-17). On January 19, 1953, the petitioners, after being served with said restraining order, filed a notice of dismissal of the instant action without leave of court (R. 131).

On January 20, 1953, respondents obtained an order to show cause why the notice of dismissal should not be vacated (R. 4, 5), and on that day both this motion to vacate and the motion for a restraining order against legal proceedings elsewhere were denied by Judge JOHN W. CLANCY (R. 136).

Respondents appealed from both of said orders of Judge CLANCY, and the Court of Appeals directed that the appeals be heard on February 12, 1953. On February 13, 1953, the restraining order of Judge HAND was modified to permit the petitioners to contest the proceedings then pending in British Guiana to obtain the consent of the British Government to the transfer or recordation of certain leases from Berbice to Reynolds.

On March 16, 1953, the Court of Appeals reversed both orders of Judge CLANCY and remanded the case to the District Court with the direction that the notice of dismissal without leave of court be vacated, and with leave to the petitioners to move to dismiss the action under Rule 41(a)(2), and directing that a hearing be held as to the motion by respondents for an injunction against action elsewhere involving the same issue between the parties as in the in-

stant action, and that the District Court exercise its discretion with respect thereto (R. 132-137).

No application was made for a rehearing by the Court of Appeals, and the petitioners have seen fit to make this application rather than avail themselves of the remedies designated by the Court of Appeals (R. 132-137).

ARGUMENT

POINT I

The notice of dismissal without leave of Court was not effective to dismiss either the entire action, or to dismiss any claim therein.

(a) ***The notice of dismissal without leave of Court was ineffective to dismiss the action against American Cynamid Company and Berbice Company Limited.***

The record discloses that the litigation involved had passed the point where petitioners could dismiss without a court order under Rule 41 of the Federal Rules. On December 5, 1952, a complaint and motion for preliminary injunction were simultaneously filed (R. 39-41, 55-58). In answer thereto respondent Cyanamid served and filed six detailed affidavits, comprising 43 pages, answering all of the material allegations of the complaint and raising basic issues on the merits (R. 59-104). Thereupon, a five-day hearing on these issues was held before the District Court at which various officials of all respondents (Cyanamid, Berbice, and Reynolds) testified with respect to the basic issues raised, and the Court made findings of fact and conclusions of law adverse to petitioners, including a finding that petitioners' possibility of success on the ultimate trial

of the action "is remote, if not completely nil" (R. 21-23). One month later, after a restraining order against litigating the same issue elsewhere was served upon petitioners, the petitioners sought to "dismiss this action as against all defendants."

Under Rule 41(a)(1) a plaintiff may not voluntarily dismiss an action by filing a notice of dismissal without leave of Court after an answer or motion for summary judgment has been filed. To corstitute an answer as that term is used in the rule, it was not necessary that papers filed by respondents bear the word "answer." *Butler* v. *Denton,* 150 F. (2d) 687 (10th Cir., 1945); *Cf. Pennsylvania Railroad Co.* v. *Daoust Construction Co.,* 193 F. 2d 659, 661 (7th Cir., 1952); *Kilpatrick* v. *Texas & Pacific Railway Co.,* 166 F. 2d 788, 792 (2d Cir. 1948) cert. den'd 335 U. S. 814. Such a technical construction would not be in keeping with the spirit and intent of the rules, which look to substance rather than form. The purpose of Rule 41(a)(1) is "to facilitate the voluntary dismissal of an action, but safeguard against abuse of the right by limiting its application to an early stage of the proceedings." 5 *Moore's Federal Practice* (2d Ed.), p. 1007. Recognizing that Rule 41(a)(1) was concerned with substance rather than form and that the proceedings had gone far beyond the point where petitioners should be permitted to withdraw, the Court of Appeals followed the few existing decisions in which the question has been raised and held that the notice of dismissal without leave of Court was ineffective under the facts of this case.

The record shows that in fact the allegations in the complaint (R. 55-57) were spelled out more fully in the affidavits in support of the motion for a preliminary injunction (R. 43-54), and these allegations not only were fully denied in answering affidavits (R. 59-104), but in oral testimony at a hearing which covered five days and 420

pages (R. 9-11, 18, 21-23, 133). Therefore, in substance, it is clear that the allegations of the complaint had been answered and denied, and as a result thereof the motion for a preliminary injunction was denied with detailed findings of fact and conclusions of law.

Furthermore, petitioners were in any event precluded from dismissing without court order because they then had pending before the Court of Appeals an appeal which they had taken from the District Court's denial of injunctive relief. This appeal was filed in the District Court on December 17, 1952 (R. 123, 133).

The petitioners' appeal could be dismissed, without respondents' consent, only by motion in the District Court under Rule 73(a). If, after perfecting such appeal, petitioners were permitted effectively to dismiss by mere filing of a voluntary dismissal under Rule 41(a)(1), they could easily defeat the whole purpose of Rule 73(a) and destroy jurisdiction over their appeal without the motion required by the latter rule. When both of these rules are read together, it is clear that the perfection of the appeal destroyed any right to dismiss by a mere notice of dismissal.

(b) *The notice of dismissal was ineffective against Reynolds Metals Company.*

Reynolds was permitted to be joined as a party defendant pursuant to Rule 20 of the Federal Rules of Civil Procedure (R. 113, 114) and the amended complaint asserts a separate claim against it which concerns the ownership of the same property as is involved in the claim against Cyanamid and Berbice (R. 105, 112).

Since the notice of dismissal was ineffective against respondents Cyanamid and Berbice, *supra,* it was ineffective against Reynolds for the following reasons:

1. The notice of dismissal seeks to dismiss the entire action and not merely a claim against Reynolds. It states:

> "Please take notice, that the plaintiffs hereby voluntarily dismiss this action as against all defendants."

This notice cannot mean that if it is ineffective to dismiss the entire action, against all defendants, it seeks to dismiss a single claim against one defendant, since that would make the meaning depend, not on the language used, but on the later purposes of petitioners.

2. Rule 41(a)(1) relates to voluntary dismissal of "an action" without leave of court and not to the dismissal of "a claim" against one of the parties to an action.

The procedure for dropping a party to the action is specifically provided in Rule 21 of the Federal Rules of Civil Procedure, Title 28, U. S. C. A., which requires an order of the Court and states:

> "* * * Parties may be dropped or added by order of the court on motion of any party or of its own initiative at any stage of the action and on such terms as are just. Any claim against a party may be severed and proceeded with separately."

The distinction between the words "action" and "claim" as used in the Federal Rules of Civil Procedure is clearly established throughout the rules and by the authorities (R. 135).

> Rules 2, 3, 8, 18, 21, 41, 42, 54(b) of the Federal Rules of Civil Procedure;
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> *Original Ballet Russe, Ltd.* v. *Ballet Theatre, Inc., et al.*, 133 F. 2d 187 (C. A. 2, 1943);
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> *Winkelman* v. *General Motors Corporation, et al.*, 48 F. Supp. 490 (S. D., N. Y., 1942);
>
> 1 *Federal Practice and Procedure*, pp. 232, 562.

3. Reynolds is an indispensable party to the action brought by the petitioners as the relief of specific performance sought against Cyanamid and Berbice cannot be granted without Reynolds as transferee of Berbice's assets, being a party to the action (R. 135).

65 *Harvard Law Review* 1050;
Silver King Coalition Mines Co. v. *Silver King C. M. Co.*, 204 F. 166, 169 (C. A. 8, 1913).

The cases permitting the dismissal or dropping of a party from an action allow it only when the party is found to be unnecessary or dispensable.

North Carolina Mining Co. v. *Westfeldt,* 151 F. 290, 296 (C. C. W. D., No. Carolina, 1907);
Jennings v. *United States,* 264 F. 399, 404, 405 (C. A. 8, 1920);
Coffee v. *Planters' Bank of Tennessee,* 13 How. (54 U. S.) 183, 186-190;
Interstate Refineries v. *Barry,* 7 F. 2d 548, 550 (C. A. 8, 1925);
Silver King Coalition Mines Co. v. *Silver King C. M. Co.*, 204 F. 166, 169 (C. A. 8, 1913).

4. Assuming that the notice of dismissal without leave of court was ineffective as against Cyanamid and Berbice, so that the issue of whether or not petitioners obtained a contract right to the property from Cyanamid and Berbice is to be decided here, then, to say that the notice of dismissal was effective against Reynolds so that petitioners are free to bring action against Reynolds in British Guiana involving the same issue of whether petitioners obtained a contract right to said property from Cyanamid and Berbice which takes precedence over Reynolds' rights, would open the door to the danger of conflicting decisions on the same issue. This would be chaotic and highly inequitable, and illustrates the importance of Rule 21 which requires leave of court for dismissal of a claim against a single party.

POINT II

There is no conflict or other special reason for review by this Court.

No grave question of vital general concern to federal litigants is raised by the petition. The question of whether a party plaintiff may withdraw after he has involved others in protracted litigation is one which ordinarily can be disposed of expeditiously by simple motion addressed to the Court. The Court of Appeals held that that procedure should be followed in the present case. Petitioners are avoiding such a motion for the reason that they are fearful of an appeal to the Court's discretion because, having had an adverse determination on the merits, they admittedly propose to harass respondents by institution of costly litigation in British Guiana, which would raise the same issue as between the same parties.

The petitioner has failed to show any conflict between the decision of the Court of Appeals below and applicable decisions of this Court or other federal courts. The authorities cited by petitioners fall into the following categories, all of which are clearly distinguishable from the present case.

(a) Those not involving Rule 41(a)(1):

Cone v. *West Virginia Pulp & Paper Company*, 330 U. S. 212;

Jones v. *Securities and Exchange Commission*, 298 U. S. 1;

Venner v. *Graves*, 255 Fed. 686 (2d Cir., 1919).

(b) Those dealing with preliminary proceedings which were strictly procedural and did not, as here, involve the merits of the controversy:

Pennsylvania Railroad Company v. *Daoust, supra;*
Kilpatrick v. *Texas & Pacific Railway Company, supra;*
Wilson & Company, Inc. v. *Fremont Cake and Meal Company,* 83 F. Supp. 900 (D. C. Neb.);
Sachs v. *Italia Societa Anonima de Navigazione,* 30 F. Supp. 442 (S. D. N. Y., 1939).

(c) Those relating to such inconsequential pre-answer proceedings as to raise no substantial question:

Compania Flomari De Vapores, S. A. v. *American Hellenic Corp.,* 8 F. R. D. 426 (S. D. N. Y., 1948);
Fleetwood, et al. v. *Milwaukee Mechanics Ins. Co.,* 7 F. R. D. 680 (W. D. Mo., 1947).

Petitioners' assertion that the decision of the Court of Appeals is contrary to long established rules is contradicted by decisions of this Court. Under earlier equity practice the right voluntarily to dismiss an action did not extend to cases where an interlocutory decree had been made or cases where the merits of a case had been explored in interlocutory proceedings in which plaintiff sought affirmative relief.

e.g. *Chicago & Alton R. R. Co.* v. *Union Rolling Mill Co.,* 109 U. S. 702;
Pullman's Palace Car Co. v. *Central Transportation Co.,* 171 U. S. 138;
5 *Moore's Fed. Prac.,* pp. 1007-08 (2d Ed. 1951).

It is submitted that the well-reasoned opinion of the Court of Appeals for the Second Circuit is in accordance with existing authority and that the questions do not present any meritorious basis for review by this court.

POINT III

The remand of the respondents' motion for injunctive relief was proper.

Having found that the notice of dismissal without leave of Court was ineffective, the Court of Appeals properly remanded the motion for injunctive relief to the lower court for exercise of its discretion as to the granting or denial of such an application. *Ring* v. *Spina,* 148 F. 2d 647 (C. A. 2, 1945). The District Court failed previously to exercise its discretion, denying the motion on the erroneous impression that the action was dismissed (R. 136).

CONCLUSION

The petition for Writ of Certiorari should be denied.

Respectfully submitted,

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